

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,	:	
	:	Criminal Case
Plaintiff	:	No. 20-CR-00239-TSE
v.	:	
	:	
EL SHAFEE ELSHEIKH,	:	December 10, 2021
	:	1:40 p.m.
Defendant	:	
.....	:

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE T.S. ELLIS, III
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(Appearances continued on next
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9 **(Pages 1 - 79)**

10 **COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES**
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P R O C E E D I N G S

COURTROOM CLERK: Court calls criminal case United States of America versus El Shafee Elsheikh, Case Number 2020-CR-239. May I have appearances, please, first for the government.

MR. FITZPATRICK: Thank you. Good afternoon, Your Honor. Dennis Fitzpatrick, Raj Parekh, John Gibbs, and Aidan Grano-Mickelsen on behalf of the United States.

THE COURT: All right. Good afternoon. And on behalf of the defendant?

MS. GINSBERG: Good afternoon, Your Honor. Nina Ginsberg, Edward MacMahon, Yancey Ellis, and Zachary Deubler on behalf of Mr. Elsheikh.

THE COURT: Good afternoon to you. And Mr. Elsheikh is present and in the custody of the marshals.

Good afternoon to you, sir.

THE DEFENDANT: Good afternoon.

THE COURT: All right. I'm going to say again parenthetically that Mr. Ellis is no relation to me, or, as he would put it, I'm no relation to him.

All right. This matter has been extensively briefed, but more recently I received a request for oral argument, so I granted it, as I typically do. Even though it was difficult for me to see what more there was to be said on this topic.

Who will argue today on behalf of the movant?

1 MS. GINSBERG: Your Honor, I'll be arguing on behalf of
2 Mr. Elsheikh. I think the government has the burden on this
3 motion, but I'm prepared to go first if that's what the Court
4 wants.

5 THE COURT: All right. No, you don't need to go first,
6 Ms. Ginsberg. You're correct, the government does have the
7 burden.

8 MS. GINSBERG: Your Honor, Mr. Ellis -- we have another
9 motion that Mr. Ellis will be arguing that is also before the
10 Court that was not addressed in argument at the hearing.

11 THE COURT: Other than the motion to suppress?

12 MR. FITZPATRICK: Judge, if the Court pleases, I
13 believe there are three central issues before the Court today.
14 First is the routine booking question regarding some false
15 statements that the defendant and Mr. Kotey made when they were
16 undergoing their biometric enrollment. The government seeks to
17 introduce those under the routine booking question exception as
18 evidence of their consciousness of guilt. They provided false
19 names, dialects, country of origin. I'll be handling that
20 motion.

21 Next, you have the issue -- the *Miranda* issue regarding
22 the so-called two-step interrogation. Mr. Parekh will handle
23 that on behalf of the United States.

24 Thirdly, you have the voluntariness of the media
25 interviews that the defendant and Mr. Kotey took part in.

1 Mr. Gibbs will handle the voluntariness argument.

2 So I'll do routine booking questions, Mr. Parekh will
3 do the FBI *Miranda* statements, and Mr. Gibbs will do
4 voluntariness and the media interviews.

5 THE COURT: Ms. Ginsberg, what's your lineup on those
6 three?

7 MS. GINSBERG: Your Honor, Mr. Ellis will address the
8 booking questions, I will address the other two.

9 THE COURT: All right. Thank you.

10 All right. Mr. Fitzpatrick, you may proceed.

11 MR. FITZPATRICK: Thank you, Your Honor. The routine
12 booking question should be the briefest of the three arguments.
13 As the Court knows from the record, the defendant and his
14 co-conspirator, Mr. Kotey, were apprehended by the SDF the first
15 week of January 2018. Their identities were unknown to the
16 U.S. Government until on or about January 21st, 2018,
17 approximately 17 days later. They underwent a standard
18 biometric enrollment that the DoD performs with recently
19 apprehended ISIS foreign fighters, or foreign fighters in
20 Northern Syria.

21 During that routine biometric enrollment process, the
22 defendant provided a false name. He stated that his name was
23 Suhayb Abdallah Jasim, he claimed that he was from Yemen,
24 claimed that he only spoke Arabic, and additionally claimed,
25 with respect to the people he was apprehended with, when shown a

1 photograph of Mr. Kotey, said he only knew him as Yahya, and
2 that he had just met him during the attempt to leave Syria.

3 Judge, functionally, those are all the equivalent of
4 routine booking questions. Those questions are not designed to
5 elicit incriminating responses, they are designed to identify
6 foreign fighters held within the custody of the SDF. They fall
7 squarely within the exception, the *Miranda* exception created by
8 *Pennsylvania vs. Muniz*.

9 And again, Your Honor, as the Court knows from
10 *Rhode Island vs. Innis* and also from *Hiibel vs. Nevada* in 2004,
11 in order for the *Miranda* rule to apply, the requirement is that
12 they -- the questionings be designed to elicit an incriminating
13 response. These questions were not designed to elicit an
14 incriminating response; it was designed to elicit truthful
15 information about who the SDF had within their custody for the
16 purposes of identifying foreign fighters for national security
17 reasons. That was the sole sum and substance of eliciting this
18 information.

19 The defendant declined to do that. He lied. Those
20 lies are probative of his consciousness of guilt. He does not
21 wish to be identified by his true name. He wants to perpetuate
22 this falsehood that he's somebody else, he's an innocuous guy
23 just trying to get out of Syria.

24 Furthermore, Your Honor, it is also evidence of the
25 conspiracy. Mr. Kotey provided the same false biographical

1 background; different fake name, but, nonetheless, a fake name,
2 also from Yemen, also claimed to only speak Arabic. So it
3 elicits evidence of a coordinated design, a unity of purpose
4 that they shared with one another.

5 So for those reasons, Your Honor, the government feels
6 this falls squarely within the four corners of routine booking
7 question.

8 THE COURT: What case would you refer me to as closely
9 factually apposite here, on this issue?

10 MR. FITZPATRICK: In the Fourth Circuit, Your Honor,
11 it's the *D'Anjou* case from 1994, cited in the government's
12 papers. That case is a defendant who was actually under arrest
13 for drug-trafficking crimes and provides false information
14 regarding his country of origin and his background.

15 The facts here are even better than that, because
16 there's not even the pretense here that this is a criminal
17 investigation. This wasn't a criminal investigation, this was
18 solely to identify the defendant for the purposes of national
19 security.

20 THE COURT: And I take it you would point out that
21 while there were plenty of -- or good reasons, at least in his
22 view, why he would give false information to an adversary on the
23 battlefield, that does not eliminate the inference of a guilty
24 conscience?

25 MR. FITZPATRICK: No. I think the defense can

1 certainly argue that, but I don't think it eliminates the
2 inference of a guilty conscience. Ultimately, that will be a
3 jury question.

4 THE COURT: It makes it a jury issue.

5 MR. FITZPATRICK: Correct.

6 THE COURT: He can tell the jury: I didn't want to
7 tell them who I really was because it's a battlefield issue.

8 MR. FITZPATRICK: Right.

9 THE COURT: All right. Thank you.

10 Let me hear from you on this issue.

11 MR. ELLIS: Thank you, sir. Your Honor, we would ask
12 you to deny the government's motion for the following reasons.
13 We would argue to the Court that it would not fall under the
14 *Miranda* exception for routine booking questions; number one,
15 most simply because Mr. Elsheikh was not under arrest.
16 Obviously he was not even in the United States of America, and,
17 according to the government's witnesses, he was not in the
18 custody of the United States.

19 Therefore, the justification for the booking exception
20 to *Miranda* just doesn't apply. The justification was crafted by
21 the courts, after someone was arrested, to allow law enforcement
22 simply to complete the booking process with accurate
23 information. And that's completely irrelevant in this
24 situation.

25 Further, Your Honor, the government has argued that --

1 THE COURT: What case would you chiefly rely on?

2 MR. ELLIS: Your Honor, I would rely on the same ones
3 as the government, and the main Supreme Court cases such as
4 *Rhode Island v. Innis* that crafted this exception. Because it
5 says the justification is to complete the booking process.
6 That's why there is no -- there are no questions to -- excuse
7 me, asked to elicit information that would incriminate someone.
8 It's just to complete the booking process.

9 There was no booking process going on here, Your Honor.
10 According to the government's own witnesses,
11 biometric enrollment is not an administrative procedure.
12 Biometric enrollment is not simply to determine the names of the
13 people in custody. It feeds into the apparatus of the
14 intelligence system of the United States.

15 And, Your Honor, you can find that in the classified
16 transcript at page 60, lines 14 through 18; page 143, lines 18
17 through 23; page 62, lines 4 to 6. This is information from the
18 government's own witnesses that this biometric enrollment
19 process is part of the intelligence system. It's not an
20 administrative procedure.

21 THE COURT: But it's also not part of law enforcement.

22 MR. ELLIS: That's correct, Your Honor. But this is
23 specifically in response to the government's argument that it
24 should fall under the booking exception.

25 THE COURT: All right.

1 MR. ELLIS: Your Honor, next, on the topic of
2 consciousness of guilt, as the Court has pointed out, there are
3 a variety of reasons why Mr. Elsheikh, after being captured in
4 Syria, would not want to give his true identity --

5 THE COURT: Yes, but that's a matter for the jury to
6 determine, if it's admissible.

7 MR. ELLIS: Well, Your Honor, also under MRE 403, it's
8 for the Court to determine whether or not the probative value of
9 that evidence is substantially outweighed by the danger of
10 unfair prejudice. And when the government's own witnesses
11 testify that there was an agreement to keep Mr. Elsheikh's
12 identity a secret in order for his own safety, I think that kind
13 of defeats their argument that it was due to consciousness of
14 guilt. You can find that in the classified transcript at
15 page 81 --

16 THE COURT: That's also a jury matter. It's not a 403
17 issue.

18 MR. ELLIS: We would argue it's part of the Court's
19 function under 403.

20 THE COURT: All right. I understand your 403 argument.
21 If you want to say anything more about it, you may do so. At
22 the moment, I'm unconvinced that there's a 403 problem.

23 MR. ELLIS: Lastly, Your Honor, I would say that the
24 government's final argument, or final basis, for admitting these
25 statements is that they fall under non-hearsay as statements of

1 a co-conspirator. We have argued that that is not the case. We
2 have cited cases in our response to the Court, primarily
3 *Dutton v. Evans*, 400 U.S. 74 from 1970, that these statements
4 are admitted only if the statement was made in the course and in
5 furtherance of the conspiracy, and not during a subsequent
6 period when the conspirators were engaged in nothing more than
7 concealment of the criminal enterprise.

8 And that's specifically the basis that the government
9 has offered as non-hearsay, that it was part of the concealment
10 scheme. And so we could ask the Court to deny it on that basis
11 as well.

12 THE COURT: All right. Thank you.

13 You may respond briefly, Mr. Fitzpatrick.

14 MR. FITZPATRICK: Your Honor, if the defense's position
15 is that *Miranda* doesn't apply, the government might accept that
16 position. But nonetheless, this is -- the questions that were
17 asked --

18 THE COURT: Well, his last argument has nothing to do
19 with *Miranda*, it has to do with whether the hearsay objection
20 applies. And you say that it's part of the conspiracy to
21 continue to conceal their identities --

22 MR. FITZPATRICK: Correct.

23 THE COURT: -- as part of the conspiracy. And you
24 heard his argument to the contrary. He cited a case where it
25 said that the 801(d)(2)(E), which is what it is, doesn't apply

1 there. Do you agree with that?

2 MR. FITZPATRICK: I don't, Your Honor. We address that
3 in our papers as well. It is a co-conspirator statement. It
4 shows an effort to jointly conceal their identities and to avoid
5 detection by their adversaries.

6 In addition, Your Honor, in the government papers we
7 also argue that it is non-hearsay because they are not false --
8 the false statements are not being offered for the truth of the
9 matter. So with respect to Kotey's statements --

10 THE COURT: In fact, they're being offered for the
11 untruth of the matter.

12 MR. FITZPATRICK: Correct, Your Honor.

13 THE COURT: Yes, I understood those arguments. What
14 else?

15 MR. FITZPATRICK: So, Your Honor, we'll rest on that,
16 Your Honor. They are co-conspirator statements. Alternatively,
17 the false statements are not being offered for the truth;
18 therefore, they're also admissible.

19 THE COURT: All right. Now, address, if you will, the
20 next issue, which is the motion to suppress. Is that right?

21 MR. FITZPATRICK: Correct, Your Honor. Mr. Parekh will
22 take up the *Miranda* FBI issue.

23 THE COURT: All right. Mr. Parekh?

24 MR. PAREKH: May I proceed, Your Honor?

25 THE COURT: Yes, you may.

1 MR. PAREKH: Your Honor, there are two legal questions
2 for the Court with respect to this issue, and the key cases are
3 *Oregon v. Elstad*, decided by the Supreme Court;
4 *Missouri v. Seibert*, decided by the Supreme Court; and
5 *United States vs. Khweis*, decided by the Fourth Circuit just
6 last year, in 2020.

7 The first legal question for the Court is, did the
8 government interrogators here use a deliberate two-step
9 interrogation technique in a calculated way to undermine the
10 later *Miranda* warning. Absent deliberately coercive or improper
11 tactics, the *Miranda* warnings are presumed to be effective. And
12 that's *Oregon v. Elstad*.

13 The second question is, if the answer to the first
14 question that I just posited is "yes," the Court must then
15 analyze whether the government - the FBI in this case -
16 instituted sufficient curative measures designed to ensure that
17 a reasonable person in Elsheikh's situation would understand the
18 import and effect of the *Miranda* warning and of the *Miranda*
19 waiver.

20 The government respectfully asks the Court to make
21 findings on both so that the record is clear, particularly given
22 that this precise issue was recently litigated in the
23 Fourth Circuit in another ISIS terrorism case known as
24 *United States vs. Khweis*, 971 F.3d 453, 2020.

25 Now, Your Honor, the Court may recall that on multiple

1 occasions, including in the landmark *Khweis* decision handed down
2 just last year, the Fourth Circuit has said that
3 Justice Kennedy's concurring opinion in *Missouri vs. Seibert* -
4 not the plurality opinion, but Justice Kennedy's opinion -
5 represents the holding of the *Seibert* court. They said that in
6 *Khweis*; they also said that in the *Mashburn* case that we cited.

7 So let's go to the first question, Your Honor: Was
8 there a calculated attempt to undermine *Miranda* warnings in this
9 case. And the government submits that the record is
10 overwhelming that there was not.

11 First, the interviews that Mr. Elsheikh underwent were
12 intelligence-gathering interviews, initially, in January through
13 early March. Your Honor heard extensive testimony about that,
14 and the fact that he underwent DoD, Department of Defense,
15 intelligence-gathering interviews.

16 Later on he undergoes an FBI Mirandized interview; two
17 separate entities conducting interviews, but both entities have
18 entirely different goals. And there's extensive explanation and
19 evidence of that in the transcript. These entities were not
20 coordinating, they weren't strategizing or otherwise sharing
21 information with each other; that is, the intelligence team and
22 the law enforcement team.

23 And if I could just briefly go through a few examples
24 of that, Your Honor. And I'll be generic so as to not go into
25 classified information. Your Honor heard testimony from

1 Individual 4, page 38 of the transcript: "The DoD objective in
2 Northeastern Syria in 2018 was countering ISIS, and, in doing
3 so, DoD was attempting to collect actionable intelligence and
4 identify the identities of foreign terrorist fighters."

5 Page 61 of the transcript: "The purpose of the
6 interrogations, January, February, and March of 2018, was to
7 collect intelligence, not to collect evidence for
8 law enforcement or for a criminal prosecution."

9 Also, page 71 of the transcript, Individual 4's
10 testimony: "Elsheikh was deemed to be a high value individual
11 by DoD, and they assessed him to have high level intelligence on
12 ISIS."

13 Your Honor then heard testimony from Individual 5,
14 pages 86 to 97 of the transcript: "The intelligence team's
15 primary mission in 2018 was defeating ISIS, and the objectives
16 of Mr. Elsheikh's interrogations were to obtain his true
17 identity, obtain the current location for Alexandra Kotey, the
18 location of any living hostages, the location of remains of
19 deceased hostages. And other objectives, intelligence-gathering
20 objectives, included understanding ISIS's communication
21 capabilities and understanding ISIS's external attack operations
22 planning."

23 Page 98 of the transcript: "The interrogations are not
24 designed to collect evidence for a law enforcement purpose or a
25 criminal prosecution." And Individual 5 testified to Your Honor

1 that he didn't even know that there would be a U.S. prosecution.

2 Pages 99 to 100: "There were multiple occasions that
3 Elsheikh was told that these interviews were for intelligence
4 collection only, and that if he was brought up on charges one
5 day, that would be in the future, and the process would be very
6 clear and apparent to him."

7 Your Honor heard testimony from Jonathan Kath, again,
8 more corroboration: "The intelligence equities in Syria in
9 2018, including locating the remains of hostages killed by ISIS,
10 collecting biometrics of ISIS fighters, and understanding the
11 history and structure of ISIS."

12 He also testified that they were interested in
13 intelligence-gathering information, remains, gleaning
14 intelligence about the organizational structure of ISIS, and
15 future external operations planning.

16 He also testified that the interrogations are not
17 designed to collect evidence for potential prosecution. And, in
18 fact, Elsheikh told him -- or he believed, through his
19 conversations with Elsheikh, rather, that Elsheikh did not
20 respect law enforcement, and he was concerned that Jonathan was
21 a member of the law enforcement team. And it was made very
22 clear --

23 THE COURT: Who was it who testified in this respect?

24 MR. PAREKH: That was Jonathan Kath, Your Honor.

25 THE COURT: All right. Go on.

1 MR. PAREKH: And he testified that they had a direct
2 conversation, and that he stated that this was an intelligence
3 interrogation entirely separate from a law enforcement
4 interrogation. And I believe that also involved Individual 5.

5 And so those are all -- and Kath's testimony is in the
6 classified transcript, and the relevant portions, pages 203 to
7 210, I believe fairly summarize what I've just mentioned. But,
8 of course, it's in the record.

9 These are all instances, Your Honor -- there's many
10 more, but these are all examples of how the government has shown
11 by a preponderance of the evidence that the DoD interrogations
12 were not designed in any way to elicit information that would be
13 useful for a criminal prosecution. They didn't care about a
14 criminal prosecution. Their objectives were intelligence.
15 Intelligence equities remained, heavy intelligence equities
16 remained at that time. There were still living hostages. So
17 they had good reason to collect this information.

18 Now, the second question, Your Honor, I believe the
19 evidence is overlapping with respect to whether there's an
20 intent to undermine *Miranda*. But even assuming there was, which
21 there clearly wasn't in this case, did the government institute
22 sufficient curative measures. And I'll just go through that
23 briefly, and I think Your Honor will find the *Khweis* decision to
24 be instructive in that regard, the Fourth Circuit's decision in
25 *Khweis*.

1 And, you know, the few points I want to mention on
2 that, the March 27th, 2018 Mirandized interview began 20 days
3 after the unwarned interviews had ended. That's a period longer
4 than any break during the series of un-Mirandized interviews,
5 and, in fact, over three times longer.

6 The FBI agents asked the SDF commander of the Kobani
7 prison in Syria, where they went to conduct this March 27, 2018
8 Mirandized interview, to use a different room than what was used
9 during the prior interviews, prior American interviews, and they
10 also asked the SDF commander that an entirely different SDF
11 guard be present for the Mirandized interview than the SDF
12 guards present for the intelligence-gathering interview.

13 On the first point, whether or not they used a
14 different room, I'm going to turn back to that. It goes to
15 their intent. Here they are in a war zone. Your Honor has all
16 kinds of testimony in the record indicating that these prisons
17 are controlled by the SDF, that Mr. Elsheikh is in SDF custody,
18 this is a dangerous war zone, ISIS fighters coming off the
19 battlefield are being housed in these prisons, and the FBI is
20 going out of their way to say: Hey, before we get started, can
21 you give us a different room, can you have a different guard sit
22 in. I know your rules require us to use your facilities, I know
23 your rules require us to have an SDF guard present, but could we
24 have a different room, different guard.

25 That goes to intent, Your Honor. There's an intent to

1 undermine *Miranda*, they would say. Forget about it, just have
2 the same guards, the same room; let's make this look exactly the
3 way he went through in the DoD interviews. So that's powerful
4 evidence of their intent.

5 Also, as to whether or not there was a different guard,
6 I think the defense will argue that there wasn't. I will point
7 Your Honor to a couple of the things in the record. One, Kath
8 testified -- let me first start with Elsheikh's affidavit. As
9 Your Honor knows Elsheikh submitted an affidavit sworn under
10 penalty of perjury which we've demonstrated contains numerous
11 material false statements. But let's just say, for the sake of
12 argument, Your Honor wants to credit one of these, which is on
13 page 6 he says: "During the first FBI interview, the SDF
14 official who was accompanying the FBI was the same SDF official
15 who was present during several of John's DoD interviews."

16 Now, John refers to Jonathan Kath, we would submit to
17 Your Honor. Kath actually testified that the SDF guard who was
18 primarily present, or was present for a lot of his interviews,
19 was in his late 30s or 40s. Your Honor then heard testimony
20 from FBI Special Agent John Chiappone, where he said: The guard
21 who was there for our Mirandized interview looked really young,
22 looked to be about 18 years old. Special Agent Nutter, who was
23 the other FBI agent present for that Mirandized interview said,
24 yeah, that guard looked really young, appeared to be in his
25 early twenties.

1 So we believe, Your Honor, that there's a fair
2 inference that it was a different guard. But again, even if it
3 wasn't, for argument's sake, the agents asked for it and
4 Your Honor has in the record that the SDF commander told the
5 agents, yes, we'll give you a different room and a different
6 guard.

7 There are also, as we've been talking about, entirely
8 different government personnel attending the Mirandized
9 interview. You have two FBI agents and an FBI linguist, whereas
10 during the intelligence interviews, those were conducted by an
11 entirely different organization, the Department of Defense.
12 Your Honor knows from the transcript that Mr. Elsheikh was
13 constantly asking his DoD interrogators, "Who do you work for?"
14 And they would say, DoD. So in his mind, and what was
15 communicated to him, the intelligence interviews were conducted
16 by the Department of Defense; whereas the March 27th, 2018
17 interview that the government will be seeking to elicit
18 statements about during trial, if Your Honor denies the motion
19 to suppress, there, the FBI agents show up and they say, "We are
20 special agents from the FBI, here is our badge." They're
21 showing their FBI credentials, they're telling him, "We're law
22 enforcement agents."

23 So that's another factor that goes both towards no
24 intent to undermine *Miranda*, but also curative measures, just
25 assuming, for argument's sake, that Your Honor wants to go to

1 the curative measures prong.

2 Agents Chiappone and Nutter, who conducted the
3 Mirandized interview, did not read, hear about, or learn any
4 information whatsoever about DoD's intelligence-gathering
5 interviews, nor did they ask Elsheikh about what he told the DoD
6 intelligence interviewers. The agents therefore could not treat
7 the second set of interviews as continuous with the first. They
8 could not ask leading questions, they could not cross-examine
9 Elsheikh with his previous statements. They, in fact, had no
10 idea, as they testified to Your Honor during the evidentiary
11 hearing, what Elsheikh had said during the intelligence
12 interviews.

13 And that's an extremely important factor. Because they
14 told Elsheikh that, and it was 100 percent true. Not once were
15 they reading or hearing about what was happening in the
16 intelligence-gathering interviews. They weren't seeking that
17 information out, and if information was actually sent to them,
18 which I'll get to in a second, they were deleting that
19 information and not opening it, not reading it.

20 The FBI agents did not provide any advice or guidance
21 whatsoever with respect to the intelligence-gathering interviews
22 of Elsheikh, and they didn't even speak to any of the
23 intelligence interrogators regarding their interviews with
24 Elsheikh. That's on page 61 to 62 of, I believe, Day 2 of the
25 transcript, or possibly Day 3. They even instructed the FBI

1 linguist to not receive any intel information. Importantly,
2 Your Honor, the FBI told Elsheikh they did not know what, if
3 anything, he had said in prior interviews, a disclosure that
4 would indicate a reset to a reasonable person in Elsheikh's
5 position.

6 In addition to informing Elsheikh of his right to
7 remain silent, they also advised him that he did not need to
8 speak with them today just because he had spoken with others in
9 the past. And the Advice of Rights form - I believe that's
10 Government Exhibit 12-7 - elaborated that the agents were not
11 interested in any of the statements he may have made to others
12 previously, and, in fact, the form explicitly stated, "We are
13 starting anew."

14 These circumstances, Your Honor, were more than
15 sufficient to allow a reasonable person in Elsheikh's position
16 to distinguish between the unwarned interviews with the
17 Department of Defense and the later Mirandized interviews with
18 the FBI, and to, quote, "appreciate that the interrogation had
19 taken a new turn," end quote. And I believe that's from the
20 *Seibert* and/or the *Khweis* decision.

21 What is extremely powerful evidence, Your Honor, of the
22 fact that Elsheikh knew that this was an entirely different set
23 of interviews, right -- because that's really a key question
24 that Your Honor has to determine, in addition to evaluating the
25 credibility of the witnesses that testify. Did Elsheikh

1 understand that just because he had made certain admissions to
2 the DoD during the intel interviews, that he did not need to
3 repeat those admissions to the FBI.

4 Your Honor, that, I think, is -- you have overwhelming
5 evidence of that. Two important examples. One, as Your Honor
6 knows, during the intelligence-gathering interviews,
7 Mr. Elsheikh spoke in detail about Mohammed Emwazi, who the
8 government submits was the beheader on much of the beheading
9 videos that the government will be seeking to introduce at
10 trial. He declined to speak in detail about Mohammed Emwazi.

11 But even more powerful is the fact that the
12 hostage-taking scheme that the defendant is charged with in
13 Counts 1 through 6 of the indictment, the agents asked him
14 whether he had participated in the hostage-taking scheme and he
15 declined to provide that information. He said he didn't want to
16 talk about it, and the FBI agents respected that and they moved
17 on.

18 If he thought for one moment that he had to repeat what
19 he told DoD -- because he had made those admissions to DoD.
20 Your Honor has extensive evidence of that in the record. The
21 DoD intelligence-gathering reports were admitted during the
22 evidentiary hearing, and Your Honor can see that he made those
23 admissions about the hostage-taking scheme to the
24 Department of Defense. That is some of the most incriminating
25 information in terms of his admissions.

1 But he didn't repeat any of that to the FBI. Why?
2 Because he knew and understood the import and the effect of the
3 *Miranda* warnings. "Okay. You're telling me, FBI agents, that I
4 don't need to talk about things that I don't want to talk about.
5 Fine, I don't want to talk about the hostage-taking." That's a
6 clear example that he clearly understood the *Miranda* warnings
7 that the agents had provided him, and the agents respected them.

8 Your Honor can also see -- and again, I know the
9 evidence here is overlapping, but Government Exhibits 12-1 and
10 12-2, Your Honor. Briefly, 12-1 and 12-2 are contemporaneous
11 emails that the lead FBI interrogator, to Special
12 Agent John Chiappone, he's telling individuals in the
13 U.S. Government, "I'm on the law enforcement team, so don't send
14 me anything regarding the intelligence-gathering interviews."
15 This is well before this case was charged, was litigated.
16 Right? This is him telling them, the U.S. Government folks, "If
17 you receive intel information, don't pass it to me."

18 12-2, he says, "I just deleted Mike's email. Not sure
19 what it said, but since I'm on the law enforcement team, I did
20 not want to take that chance. Please have someone filter this
21 before adding me and take me off the distribution."

22 Again, goes to the agent's mind and their intent. If
23 they were seeking to undermine *Miranda*, they would have just
24 read the emails and they would have said: Oh, this is great
25 insight for me to use when I later interrogate Elsheikh in a

1 Mirandized interview. Instead, they are actively going out of
2 their way to say: Not only am I not going to read this
3 information, but take me off the distribution. I don't even
4 want to take the chance.

5 Your Honor heard extensive testimony about the
6 conditions of the March 27th, 2018 interview. Right? Elsheikh
7 was unrestrained during the interview, no handcuffs, no leg
8 restraints. He had a relaxed and calm demeanor when he was
9 brought into the room by the SDF guard, and he remained that way
10 during the interview. He wasn't timid, he wasn't scared, he
11 wasn't angry in any way. He was very comfortable answering the
12 FBI's questions. He was comfortable correcting the translator.
13 He wasn't afraid to speak up at all. He appeared very much in
14 control.

15 A lot of the things I'm saying are almost verbatim
16 quotes from the transcript. He didn't appear to be confused;
17 his answers tracked the FBI agent's questions; he was making eye
18 contact with the FBI; he was paying attention during the reading
19 of the *Miranda* rights. The agents observed no signs of injury,
20 abuse, bruising. And when they asked him about his health, he
21 said he was surprised at how well he's been treated, and that
22 the treatment he has received from the SDF was actually
23 different than the propaganda that ISIS had previously published
24 about the SDF to its members. Page 77 of Day 3 of the
25 transcript, I believe.

1 He was able to clean clothes, work out, play chess,
2 converse with other inmates and prisoners, and he never once
3 mentioned needing any medical attention. No one in the room had
4 any visible weapons; everyone was dressed casually. Elsheikh
5 was offered restroom breaks, prayer breaks, food, beverages,
6 cigarettes, Chai tea. As I mentioned, the agents introduced
7 themselves as FBI agents, they both showed their credentials --

8 MS. GINSBERG: Judge, I'm sorry, but to quote your
9 phrase about in recognition of the shortness of life, this
10 testimony has absolutely nothing do with whether this was a
11 two-step process, which is the subject --

12 THE COURT: That's your view. It's not his view.
13 Next.

14 MR. PAREKH: Another example, Your Honor, of the
15 evidence indicating that Elsheikh knew and understood the import
16 of the *Miranda* warnings he was given - which, of course, does go
17 to the two-step argument the defendant is making - he had
18 admitted during the Mirandized interview that he had committed
19 robberies. And Your Honor will recall that the testimony of
20 Special Agents Chiappone and Nutter was that: "We asked him
21 about those robberies, and we asked him to provide details. And
22 he said that he did not wish to answer any further questions
23 about robberies that he had committed, and he would not provide
24 any further information on those." That's on pages 93 to 94 of
25 the transcript.

1 He also provided minimal information about
2 Alexanda Kotey. In the intelligence-gathering interviews, he
3 provided details about Kotey's involvement in the hostage-taking
4 scheme, but yet when he was asked about Kotey during the
5 Mirandized interviews, he declined to provide those details, and
6 said: If you want to find out information about Kotey, go ask
7 him, don't ask me.

8 He also, as I mentioned, didn't want to disclose
9 whether he had participated in a hostage-taking scheme, and the
10 agents moved on. He said he didn't want to talk about anything
11 related to the hostages and the beheading videos; whereas during
12 the intelligence-gathering interviews, he freely provided that
13 information.

14 Your Honor also knows from the testimony - and I
15 believe the defense has argued in their papers - that Elsheikh
16 didn't waive his rights; that the agents just continued asking
17 him questions despite his request for a lawyer. Elsheikh also
18 claims that in his affidavit to the Court.

19 There was no evidence of that at all during the
20 suppression hearing. In fact, the evidence was the opposite,
21 that the agents actually -- they understand what an invocation
22 is. Powerful evidence of that is that when they went to
23 interview Alexanda Kotey, Your Honor heard testimony that Kotey
24 invoked his rights and said, "I'm not going to talk to you
25 unless I have a lawyer." The agents never had a Mirandized

1 interview with Alexandra Kotey as a result of that invocation.

2 At that time, of course, they had no idea back in 2018
3 that Alexandra Kotey would be pleading guilty before Your Honor
4 in 2021. Nobody had any idea. At that time Kotey and Elsheikh
5 weren't even charged. Again, powerful evidence that these
6 agents understood the meaning of *Miranda*, and when someone
7 invoked, they stopped. That's what Kotey did; they stopped
8 asking him questions and they moved on.

9 So there's no evidence whatsoever that Elsheikh had
10 invoked his right to counsel, or that he had stated that he did
11 not wish to answer questions. He refused to sign the *Miranda*
12 form. Fine, yes, he didn't want to sign the *Miranda* form.
13 That's in the record. But he said he was willing to answer
14 questions, just questions that he wanted to answer, not
15 everything. And that was illustrated by many of the things that
16 I just discussed.

17 Page 156 of the transcript, right? That's
18 Special Agent Julius Nutter's testimony. He corroborates nearly
19 everything, I believe, that Special Agent Chiappone testified.
20 But this is also really powerful evidence that the defendant
21 knew the import and effect of *Miranda*. Actually, Elsheikh, when
22 his rights were being read to him, he stopped
23 Special Agent Chiappone and he said, "Tell me more about this
24 'we are starting anew.' What does that mean?"

25 Two things there, Your Honor. One, it shows he was

1 paying attention. Right? He wasn't just letting the agents
2 read through. He was paying attention, and he specifically
3 asked a question about, "What does that mean, we are starting
4 anew?" And page 156 of the transcript, Special Agent Nutter
5 testified that: "Special Agent Chiappone advised the defendant
6 that starting anew meant it did not matter who he had spoken to
7 earlier. This is a new and totally separate interview; that he
8 is not obligated to speak to us based on any prior statements
9 that he has made or any other individuals that he has spoken
10 to."

11 Finally, Your Honor, I'm wrapping up. Justice Kennedy
12 in *Seibert* says -- and rather than paraphrasing his opinion, I
13 have the opinion in front of me. This is Justice Kennedy's
14 controlling concurrence in *Seibert*, 542 U.S. 600, 2004
15 Supreme Court case. Justice Kennedy, of course, says that, "The
16 admissibility of post-warning statements should continue to be
17 governed by the principles of *Elstad* unless the deliberate
18 two-step strategy was employed."

19 And so I've been describing to Your Honor all of the
20 evidence which indicates that there was no deliberate or
21 calculated attempt to undermine *Miranda*. So the government's
22 position is that the Court can find, on prong one, no attempt to
23 undermine *Miranda*. Elsheikh was given *Miranda* rights, and, in
24 fact, he was given even greater *Miranda* rights than what
25 individuals are normally given. Right? And Your Honor sees

1 that in all of the advisements he's given in
2 Government Exhibit 12-7.

3 But again, Your Honor, we would respectfully urge the
4 Court to find on both prongs. We think that would be helpful
5 for the record. And in *Khweis*, the Fourth Circuit declined to
6 reach prong one. The Fourth Circuit said: Okay, even assuming
7 that there was a deliberate attempt to undermine *Miranda*, the
8 curative measures were sufficient in this case.

9 And so that's why we think it's important for
10 Your Honor to make factual findings on both prongs.

11 And when it comes to the curative measures,
12 Justice Kennedy's controlling opinion says, and I'm reading from
13 the opinion: "For example, a substantial break in time and
14 circumstances between the pre-warning statement and the *Miranda*
15 warning may suffice in most circumstances, as it allows the
16 accused to distinguish the two contexts and appreciate that the
17 interrogation has taken a new turn. Alternatively, an
18 additional warning that explains the likely inadmissibility of
19 the pre-warning custodial statement may be sufficient."

20 And so Justice Kennedy provides two examples. He
21 doesn't say those are the only two examples, and that those are
22 dispositive, that it has to be those two examples. But in this
23 case, the government actually satisfies both examples, exactly
24 from Justice Kennedy's opinion and from the Fourth Circuit's
25 opinion in *Khweis*.

1 Going to the second alternative example, the *Miranda*
2 form explicitly says: "If you previously made statements to
3 others in the U.S. Government, it is likely that those
4 statements will not be usable against you in a U.S. court.
5 Anything you now say can be used against you in a U.S. court."

6 So already, Your Honor, on curative measures, we've
7 already done what Justice Kennedy gave as an example, right, in
8 the second one.

9 In the first, which is separate and apart from the
10 alternative example that I read, where he says, "a substantial
11 break in time and circumstances," 20 days had elapsed between
12 the last intelligence-gathering interview and the first
13 Mirandized interview. That's over three times of any prior
14 break that he had had. The government submits that that is
15 certainly substantial, 20 days. In *Khweis*, that was actually a
16 case that --

17 THE COURT: You said that's over three times any prior
18 break that who had had?

19 MR. PAREKH: Yeah, so in the DoD intelligence-gathering
20 interviews, which were from January to early March - March 7th
21 was the last DoD intelligence-gathering interview - there were,
22 at times, breaks. In other words, DoD wasn't interviewing
23 Elsheikh every single day.

24 And so that was -- the reason I use that language is,
25 that comes straight from the *Khweis* decision, from the majority

1 opinion; that in *Khweis*, there was intelligence-gathering
2 interviews followed by law enforcement interviews, Mirandized
3 interviews. Right? It was actually a case that I was on the
4 trial team on. And *Khweis* was captured on the battlefield in
5 Iraq. He had joined ISIS for a period of months; he then was
6 brought into a Kurdish facility and he was interrogated.

7 First, in that case, he was actually interrogated by an
8 FBI agent during the intelligence-gathering interviews, followed
9 by FBI agents interrogating him during a series of Mirandized
10 interviews. And in *Khweis*, the break in time during
11 intelligence-gathering interviews, the longest break was
12 six days.

13 And so in *Khweis*, what we did was we had a 10-day
14 attenuation break such that in between the last
15 intelligence-gathering interview and the first Mirandized
16 interview, there were 10 days of time that had elapsed. And the
17 reason we did that in *Khweis* was we wanted to show *Khweis* that
18 this is an entirely difference phase that you're undergoing now.

19 In this case, in the *Elsheikh* matter, we doubled the
20 attenuation period that the Fourth Circuit last year blessed in
21 *Khweis*. The Fourth Circuit said that 10 days was more than
22 sufficient, given that the prior break was six days; here, the
23 longest break that Mr. *Elsheikh* underwent during the
24 intelligence-gathering interviews conducted by the DoD was
25 six days, similar to *Khweis*. But yet, when it came time to

1 conduct the Mirandized interview of him on March 27, 2018,
2 20 days had elapsed between any prior intelligence-gathering
3 interview and the beginning of his Mirandized FBI interview.

4 So when Justice Kennedy says a substantial break in
5 time, well, if the Fourth Circuit found that 10 days was
6 substantial -- and, in fact, in the *Khweis* decision, the
7 Fourth Circuit quotes a decision from the Supreme Court, *Dixon*,
8 I believe it is. In *Dixon*, the break was four hours. In
9 *Seibert*, I believe the break was something like 15 to
10 20 minutes. It was very short. Right? Which the Supreme Court
11 found problematic, in addition to a lot of other things. They
12 had the same officer who had done the un-Mirandized interview
13 perform the Mirandized interview, and he was grabbing her hand
14 and saying: Well, didn't you just confess to me, 15, 20 minutes
15 ago, or, rather, in the prior interview?

16 This is not a *Seibert* situation, Your Honor. 20 days
17 of a gap, different organizations performing these interviews,
18 different interrogators. The FBI has no idea what Elsheikh said
19 during the intelligence-gathering interviews. So that goes to a
20 substantial break in time.

21 And then, Justice Kennedy says a substantial change in
22 circumstances. Right? And here I've already talked about that:
23 The change in personnel; FBI versus DoD; entirely different
24 purposes of the interview, which was explained to him, right, in
25 the intelligence-gathering interviews. Your Honor has numerous

1 references in the transcript where DoD is telling Mr. Elsheikh,
2 "This is for intelligence collection;" whereas when the FBI
3 comes to him, they say, "Hey, listen, anything you say now can
4 be used against you in court." That was never once said to him
5 during the intelligence-gathering interviews. So that's a very
6 different circumstance. Different SDF guard, we would posit.

7 And also, the Mirandized statements themselves on the
8 form. We went above and beyond, and included the additional
9 warning that explains the likely inadmissibility of the
10 pre-warning statements, in addition to all the other statements
11 about: Hey, you don't need to talk to us just because you may
12 have spoken to others in the past. We're starting anew.

13 So we believe we've satisfied both examples, including
14 additional curative measures that were undertaken, as I've
15 already described and as Your Honor has seen in the transcript.

16 And so for all those reasons, Your Honor, we believe
17 Your Honor should find on both prongs; that there was no
18 deliberate attempt to undermine *Miranda*, but even assuming, for
19 the sake of argument, that there was, that there was more than
20 sufficient curative measures, and that we followed exactly what
21 Justice Kennedy had indicated in his opinion in *Seibert*, and
22 what the Fourth Circuit had indicated was more than sufficient
23 in *United States vs. Khweis* last year.

24 Thank you.

25 THE COURT: Thank you. Ms. Ginsberg?

1 MS. GINSBERG: Your Honor, I'm going to be considerably
2 briefer.

3 THE COURT: That would be welcome.

4 MS. GINSBERG: First of all, the government has made
5 sort of a blanket statement that there were glaring lies in
6 Mr. Elsheikh's declaration. The government has no proof of
7 that. That's the government's opinion, but it should not be
8 stated as a matter of fact.

9 Your Honor, we are not disputing that the purpose of
10 the DoD interviews was intelligence-gathering, and Mr. Parekh
11 went to great lengths to describe all the various intelligence
12 reasons for the 26 separate DoD interviews. The fact remains
13 that the intelligence purposes of the DoD interviews do not
14 necessarily bear on Mr. Elsheikh's understanding that these
15 interviews had different purposes. Because they did ask the
16 types of questions in both interviews -- whether their primary
17 purpose was intelligence-gathering or not, similar questions
18 were asked, whether by design or otherwise, in both sets of
19 interviews.

20 There were -- I think the best indications of what was
21 in Mr. Elsheikh's mind -- and the Court -- we don't disagree
22 with any of the legal analysis that the government has
23 presented. I think we probably made the same arguments in our
24 pleadings. But the question is not what was necessarily in the
25 minds of the interrogators, but what was in Mr. Elsheikh's mind;

1 whether he was in a position to distinguish the difference
2 between the DoD interviews and the FBI interviews.

3 And, Your Honor, it's our position that that did not
4 occur, and that the so-called curative measures were not
5 sufficient measures for Mr. Elsheikh to be able to differentiate
6 between the DoD interviews and the law enforcement interviews.
7 And I'll give the Court several examples as to why we believe
8 that's the case.

9 Mr. Elsheikh was subject to 26 separate DoD interviews.
10 They occurred in two separate locations, two separate prisons.
11 The first set of interviews were conducted at a prison called
12 Ayn Issa. Those were conducted by DoD, members of the
13 Department of Defense interrogators, but also by someone who was
14 a member of the FBI fly team, Jonathan Kath. And he
15 participated in the DoD interviews, and actually conducted
16 separate interviews with Mr. Elsheikh at the second prison, the
17 Kobani prison, which was the same prison at which the FBI
18 interviews occurred. And Detective -- Agent Kath admitted
19 freely that he concealed -- he purposefully concealed his
20 identity as an FBI agent from Mr. Elsheikh. He actually
21 testified that he lied to Mr. Elsheikh right out of the gate and
22 told -- in discussing what his identity was, when he was asked
23 by Mr. Elsheikh if he -- about the FBI and the relationship
24 between the DoD individuals and the FBI.

25 The interview rooms that were used to conduct the

1 interviews by Agent Kath were the -- at least with respect to
2 Mr. Kotey, the same rooms as the FBI interviews of Mr. Kotey.
3 So what we know is that despite a request by the FBI to get --
4 to have the interviews conducted in different rooms, that at
5 least with respect to Mr. Kotey, the interviews conducted by
6 Agent Kath in his capacity as a part of the DoD investigative
7 team was the same room that the FBI agents conducted their
8 law enforcement interview of Mr. Kotey.

9 And none of the agents was able to say that that was
10 not also the case with respect to the interviews conducted --
11 the law enforcement interviews conducted of Mr. Elsheikh. And
12 Mr. Elsheikh, in his declaration, affirmatively states that he
13 was interviewed in the same room by Agent Kath as he was
14 interviewed by the FBI law enforcement interrogators.

15 He was, in fact, presented with a written *Miranda* form.
16 He refused to sign it. He asked the agents specifically for an
17 explanation for what "starting over" meant, and was told
18 generally, I don't have to -- you don't have to talk to the FBI
19 just because you participated in the DoD interviews. That
20 doesn't -- the fact that he didn't have to participate in the
21 interviews with the FBI does not mean the same thing as not
22 viewing the interviews as a continuation of the earlier -- of
23 the earlier interviews.

24 The agents advised Mr. Elsheikh, in connection with the
25 *Miranda* form, that he had the right to have a lawyer. They

1 actually -- agents knew at the time that they read him this form
2 that they didn't have the ability to provide him with a lawyer.
3 They knew, at a minimum, that they would have to ask permission
4 of the SDF to gain access to -- to provide Mr. Elsheikh with a
5 lawyer, should he have requested it. And, in fact, they found
6 out the next day that the SDF would not permit Mr. Kotey to have
7 a lawyer, despite the fact that he had requested it.

8 But the agents had a plan from the outset, which was
9 indicated in their course of action plans, to minimize the
10 *Miranda* warnings and the impact of the *Miranda* warnings on
11 Mr. Elsheikh. And Your Honor has, I believe it's Defendant's
12 Exhibit 10, that has an email from Agent Nutter to
13 Agent Chiappone. These are the two FBI law enforcement
14 interrogators, where all three course of action notes begin with
15 "Downplay Advice of Rights as procedural requirement to conduct
16 interview."

17 That is the clearest, the absolute clearest expression
18 of what the intent of the FBI law enforcement agents were in
19 distinguishing between the DoD interviews and the
20 law enforcement interviews. And it's consistent with -- it's
21 consistent with their intentional representation that he had the
22 right to a lawyer, without having any knowledge that they would
23 ever be able to provide him with one.

24 Probably the most critical overlap between the DoD
25 interviews and the SDF interviews was -- and the law enforcement

1 interviews was the presence of SDF either interrogators or
2 guards, as they were described differently by different agents.
3 But there were SDF officials who were present at each of the DoD
4 interviews and at each of the law enforcement interviews.

5 The interviews were conducted in Arabic, a requirement
6 of the SDF to allow the interviews to occur. So there is, at a
7 minimum, a question as to the total accuracy of the translations
8 between the questioning and answering -- the answers provided by
9 Mr. Elsheikh. And that's particularly problematic with respect
10 to any requests that he made to have a lawyer present.

11 Mr. Elsheikh knew at the time of the law enforcement
12 interviews that the DoD had previously been cooperating with the
13 SDF and exchanging information with the SDF, because he knew
14 that the DoD had disclosed his true identity to the SDF.
15 Mr. Elsheikh had concealed his true identity during the SDF
16 intake processing, and it wasn't until the DoD came in and did
17 the biometric enrollments that the SDF learned his true
18 identity.

19 So throughout all of these interviews, there are SDF
20 personnel sitting in the interviews who Mr. Elsheikh knows have
21 some form of information-sharing agreement with the
22 U.S. Government officials.

23 They also are the same individuals that Mr. Elsheikh
24 claims had been beating him at various intervals at the time he
25 was captured, after he was captured, and at different times

1 within that timeframe of the various DoD and FBI interviews.

2 And we know from admissions that were made by a number
3 of the DoD interviewers, interrogators, that part of their
4 agreement with the SDF to have access to
5 Mr. Elsheikh and the other prisoners required them to share
6 their 302s, and required the information-sharing agreements that
7 allowed the SDF to know what Mr. Elsheikh had said to the DoD,
8 and allowed the DoD and the FBI to know what Mr. Elsheikh had
9 said to the SDF. And there were representatives from the SDF
10 that were present during each of the DoD and law enforcement
11 interviews.

12 The length of time -- there was a break of 20 days
13 between the DoD interviews and the SDF interviews, but the
14 overall length of the DoD interviews was, I believe, at least
15 30 days, perhaps longer. And the fact that there were
16 additional -- there was a break of 20 days...

17 THE COURT: Excuse me a moment.

18 (OFF THE RECORD.)

19 THE COURT: All right. You may continue.

20 MS. GINSBERG: The break of 20 days between the DoD --
21 the end of the DoD interviews and the beginning of the FBI
22 interviews is not as significant when looked at in terms of the
23 overall length of the DoD interviews, which was considerably
24 longer than any of the case -- any of the interviews that were
25 involved in the cases that the government cited. So the whole

1 interview process had a much longer timeframe, and the break for
2 that reason would have seemed to Mr. Elsheikh not to be nearly
3 as significant.

4 Mr. Elsheikh knew, and it says in his -- included in
5 his declaration that he was -- when the SDF discovered that he
6 had given a false identity as a result of the U.S. biometric
7 enrollments, that he was beaten by the SDF. So to the extent
8 that coercion was present -- to the extent that coercion is
9 relevant to the two-step inquiry, coercion -- the fact that
10 there was no coercion exerted on him directly by the
11 U.S. Government officials conducting the different interviews
12 does not lessen the impact of the coercion that was present as a
13 result of having the SDF interviewers and guards present during
14 all of these interviews.

15 Your Honor, it is -- there are -- it's difficult for us
16 not to acknowledge that there are factors that are in the
17 *Seibert* decision that the government has satisfied. But the
18 extent to which the U.S. Government interrogators had agreements
19 with the SDF officials, and the extent to which the SDF
20 officials were present throughout these interviews is, I would
21 submit, sufficiently overwhelming to mitigate against the
22 curative measures that the government did put into effect.

23 They made attempts, and there's no question they made
24 attempts, to follow the rule book that was set out in *Khweis*,
25 and, from their perspective, did that reasonably effectively.

1 But whether Mr. Elsheikh was in a position, given the length of
2 the DoD interviews, the overlapping environments that these
3 interviews were conducted in, that all of the interviews were
4 conducted in, and the fact that -- the very significant fact
5 that the SDF officials were present for all of these interviews,
6 we would submit would render the curative measures insufficient
7 to permit Mr. Elsheikh to distinguish, for this purpose, the
8 difference between the law enforcement and intelligence
9 interviews.

10 THE COURT: All right. Thank you.

11 Mr. Parekh, you have a very brief response, and then
12 we'll go to Mr. Fitzpatrick's part. No, I guess Mr. Gibbs.

13 MR. PAREKH: Very briefly, Your Honor.

14 Ms. Ginsberg started off her argument by indicating
15 that there aren't false statements in Mr. Elsheikh's affidavit.
16 We respectfully disagree, and we believe Your Honor has
17 three days of transcripts which indicate numerous examples that
18 we pointed out that there were material false statements made.

19 Number two, Ms. Ginsberg said, well --

20 THE COURT: Are they in your brief?

21 MR. PAREKH: In terms of the material false statements?
22 Yes. For example, one of them is that Mr. Elsheikh says that
23 the SDF had indicated that -- at some point in Derik prison, in
24 2018, he indicates they beat him for 20 minutes with a bat. The
25 SDF said you can't even have bats in the prison, number one.

1 Number two, there was no signs of abuse, mistreatment,
2 injury whatsoever on Mr. Elsheikh when he was at Derik prison,
3 and Your Honor heard testimony from two Derik SDF officials that
4 corroborate that.

5 Number three, we pointed out in our brief that
6 Mr. Elsheikh did not repeat what he merely had said in his DoD
7 interviews. Unlike what he claims in his affidavit, he says
8 that: The SDF abused me and had indicated that from this point
9 forward, all of the media interviews that I give and all of the
10 statements I make, I have to repeat what I told DoD.

11 And Your Honor heard testimony through witnesses,
12 including Special Agent Dan O'Toole, which pointed out that that
13 was false, and Your Honor saw video clips during the suppression
14 hearing which indicated that was false.

15 Mr. Elsheikh also had indicated that he made specific
16 statements to the *Washington Post* during his interview.
17 Your Honor has the entire *Washington Post* interview, because the
18 defense had subpoenaed the *Washington Post*, and none of the
19 statements that Mr. Elsheikh claimed in his affidavit that he
20 told the *Washington Post* is in the *Washington Post* interview.
21 Nor is it in the Sean Langan interview, if they want to argue
22 that he had made a mistake. And so there are other indications
23 as well. I think Mr. Gibbs will go through them.

24 Ms. Ginsberg had indicated that it's a major factor
25 that similar questions were asked between the

1 intelligence-gathering interviews and the Mirandized interviews.
2 That has no consequence whatsoever. That's not borne in any
3 case law. The fact is, is that there were entirely different
4 personnel conducting these interviews, and the FBI team had no
5 idea what the intelligence-gathering team had asked.

6 And perhaps the most powerful evidence to rebut nearly
7 everything that Ms. Ginsberg said is that the statement that the
8 FBI wanted to get, the topic that they wanted to ask
9 Mr. Elsheikh about, which is, "Tell me about the hostage-taking
10 scheme," which he spoke extensively about, and his involvement
11 in, during the intelligence-gathering interviews; he declined to
12 tell the FBI agents about his participation in the
13 hostage-taking scheme. He declined to give them details about
14 his conversations with Mohammed Emwazi, at least at one
15 particular point, and he declined to provide other details
16 regarding questions that were asked of him.

17 So if he thought this was one continuous interview with
18 the DoD, then he would have just continued speaking about his
19 involvement in this horrific, murderous, savage hostage-taking
20 scheme in which he participated.

21 Two more points, Your Honor. Ms. Ginsberg pointed out
22 that there was some discussion regarding downplaying the *Miranda*
23 rights. Your Honor asked questions about that on pages 128 to
24 129 of Day 3 of the transcript. That was a statement in an
25 email from Special Agent Nutter well before the Mirandized

1 interview had actually been conducted. It was a February 2018
2 email. Special Agent Nutter did not read the *Miranda* rights to
3 Mr. Elsheikh. The *Miranda* rights were read by
4 Special Agent Chiappone.

5 And Your Honor asked him: "Did you downplay those
6 rights?"

7 He said no.

8 And Your Honor took him through a series of questions
9 where he indicated he read the form verbatim, Mr. Elsheikh was
10 paying attention, Mr. Elsheikh was looking at him, Mr. Elsheikh
11 asked a question about the form, and in no way was there any
12 downplaying of those rights.

13 So that's a basic credibility finding that Your Honor
14 can make.

15 And finally, Ms. Ginsberg pointed out that we tried to
16 follow the *Khweis* decision. Not only did we try to follow the
17 *Khweis* decision, but we went well above and beyond what the
18 Fourth Circuit said was permissible in *Khweis*. And, again,
19 powerful testimony. If the agents wanted to undermine *Miranda*,
20 Your Honor wouldn't have heard the following testimony:

21 Special Agent Chiappone told Your Honor that before he
22 traveled to Syria, he read Judge O'Grady's opinion, the
23 District Court opinion in *Khweis*. And he was asked: Why did
24 you read that?

25 He said: Because we wanted to make sure that we

1 followed the law exactly as it was laid out in this court.

2 And so that's very powerful evidence, Your Honor, that
3 these agents were not trying to undermine *Miranda*. When you
4 have an agent telling you under oath that, I actually read a
5 decision by a fellow judge of this court to make sure that I
6 followed exactly the boundaries, powerful evidence that there
7 was no attempt to undermine *Miranda*. And even assuming there
8 was - which there was not - curative measures were implemented.

9 Thank you, Your Honor.

10 THE COURT: All right. Mr. Gibbs?

11 MR. GIBBS: Thank you, Your Honor. The last topic I
12 would like to discuss with Your Honor this afternoon involves
13 the defendant's motion to suppress the media interviews the
14 defendant gave. And I'm sure Ms. Ginsberg will clear this up in
15 her portion, but I don't believe the defense is moving to
16 suppress the 2018 media interviews. Because if you read the
17 defendant's affidavit, essentially what he says is, beginning in
18 2019, the later media interviews, he claims that he was
19 subjected to so much mistreatment, so much physical abuse that
20 his will was overborne, and that those statements to the media
21 in 2019 were rendered involuntary.

22 In response to that, Your Honor, the government called
23 three SDF witnesses who testified here before Your Honor. I
24 would submit that they came across as very consistent, very
25 credible. Over the course of more than a day, they testified

1 about SDF prisons, their roles in them, the way the prisons are
2 run. And they were very consistent, on cross-examination and on
3 direct, that they were not aware of the type of mistreatment
4 that Mr. Elsheikh alleged specifically as to himself, or that
5 type of mistreatment at SDF prisons generally.

6 The government also called a number of DoD witnesses
7 who testified that at times, as part of their duties doing these
8 interrogations, they would go into SDF prisons, and so they were
9 able to observe somewhat the inner workings of the SDF prisons.
10 They also testified consistently, and they also said the same
11 thing about DoD treats allegations of mistreatment very
12 seriously. And when they get them, they investigate them and
13 they report them; whether the allegations are deemed to be
14 credible, on one end, not credible, on the other, or there's
15 uncertainty, and they're not sure how to determine it.

16 And, in fact, Your Honor heard from one interrogator
17 who testified that at one point Mr. Elsheikh made a statement to
18 him about having been mistreated within the SDF prison, and the
19 interrogator made it very clear and said: Look, if you're
20 telling me this, I need to report this. I need to get
21 information. Tell me who did this to you. Tell me what
22 happened. And the defendant refused to do that.

23 But the interrogator didn't give up. He continued to
24 press him, until finally the defendant said: Oh, don't worry
25 about it. He said: That 120-pound Kurdish - and he used a slur

1 to describe him - couldn't hurt a fly.

2 So, Your Honor, we would submit that the government put
3 on a good deal of evidence demonstrating that the SDF prisons
4 were well run, that the senior people within SDF took detainee
5 treatment seriously, and that the DoD interrogators who were in
6 those prisons for some periods of time also didn't observe
7 mistreatment; but they took it seriously, and they made it clear
8 to SDF that detainees had to be treated properly.

9 In response, the defense didn't put on any witnesses.
10 However, they do point to Mr. Elsheikh's declaration. We would
11 submit that since the government never had a chance to test
12 that, it shouldn't be afforded a great deal of weight. But we
13 would also submit to Your Honor that there are some interesting
14 aspects to the declaration.

15 Mr. Parekh described for Your Honor a couple of
16 instances where there were demonstrably false statements in the
17 declaration. The one he mentioned about the *Washington Post*
18 interview, the defendant actually puts specific quotes in the
19 declaration at page 9 about what he claims happened. And he
20 says that when he was interviewed by the *Washington Post*, the
21 interviewer asked him why he looked so bad in the CNN interview,
22 and he responded by saying: Let's just say, I was not feeling
23 so good.

24 As Mr. Parekh indicated, the *Washington Post* uploaded
25 that entire interview. Special Agent O'Toole testified that he

1 watched the entire interview, and he also testified that that
2 exchange never happened.

3 The defendant also claimed in the declaration at
4 page 10 that when he went into DoD custody, he was examined by a
5 doctor. And he claims that he told the doctor that: I was
6 severely mistreated at the hands of the SDF. And again, that's
7 at page 10.

8 Special Agent O'Toole also testified that he
9 interviewed the doctor and asked him about that, and the doctor
10 told him that the defendant told him no such thing.

11 We also entered in the case an exhibit which was the
12 doctor's -- the written report that the doctor produced. If we
13 could pull up 15-7. This is in evidence, Your Honor.

14 So the defendant claimed that he told the doctor about
15 this physical abuse. As you heard, Special Agent O'Toole
16 testified that it didn't happen. But if we look at the form
17 itself - and again, this individual is clearly a doctor, by the
18 handwriting - Mr. Elsheikh provided information to the doctor.
19 At the top where it says "current medical problems," it lists
20 "coughing, sneezing, runny nose for the last two days."

21 Down the right-hand column, there was -- it lists drug
22 allergies. The doctor put "NKOA," no known allergies [sic].
23 For food allergies it puts, "No. Prefer vegetarian, will eat
24 fish." And then farther down for job, it lists mechanic.

25 So this is a defendant who spoke to the doctor at some

1 length about his medical situation, but at no time after he had
2 been moved from SDF custody into DoD custody did he ever tell
3 the doctor who was examining him about the mistreatment that he
4 claims he endured at the hands of SDF. And, in fact, there's a
5 notation at the top for "Injuries/Abuse," and the doctor noted,
6 "No concerns here."

7 Farther down within the form it lists
8 "Impression/Plan," and the doctor indicated that he was "clear
9 for detention."

10 Now, Your Honor, despite that, in the defendant's reply
11 brief, which is at Docket 141, at page 12 of that reply, they
12 attached two still photos from the CNN interview in 2019. And
13 they claim in their motion that, quote, "During the interview,
14 bruising is clearly observable on Elsheikh's face and head."

15 Could we bring the form back up real briefly?

16 So, Your Honor, on the form itself, the doctor did a
17 physical exam. He did note one thing on the defendant's body.
18 And if we look at the figure to the left there, facing forward,
19 for the forehead the doctor listed -- and this was --
20 Special Agent O'Toole testified about this, that the doctor
21 identified a prostration mark, a bruise caused from prayer, on
22 the defendant's forehead.

23 So despite all the allegations about being hit in the
24 head, an infected ear, being kicked down the stairs, the only
25 visible injury that the doctor identified in the course of

1 examining the defendant was a bruise that the defendant had
2 given himself. And the other thing is, in the declaration, the
3 defendant never said: During the course of my SDF custody and
4 my mistreatment, I was hit in the head in such a way that it
5 left a bruise on my forehead.

6 Now, Your Honor, ultimately, the defendant's
7 declaration is nine and a half pages, single spaced, but it
8 really comes down to one specific claim. The defendant claims,
9 starting at page 8, about the mistreatment he endured, and then
10 he said: "After the beatings ceased, the head of the prison
11 said, 'Consider this your first day of detention. Everything
12 that happened before never happened. You have no rights. This
13 is the best it is going to get. From this point on, it can only
14 get worse unless you can do what you're told. From now on, you
15 don't refuse to speak to anyone, and when you speak to anyone,
16 you tell them exactly what you told the American DoD.'"

17 The next page, at page 9, the defendant claims, or
18 said: "At this point I knew that I would not be physically
19 beaten if I kept restating my false DoD confessions to the media
20 outlets. I felt like a broken and abused animal, doing whatever
21 I could do to be properly fed and not be physically abused."

22 Given that, you would think the defendant would do what
23 he was told to do, repeat what he said to DoD. So I want to
24 look at two instances of what he told DoD.

25 So if we can publish Exhibit 2-3, which is in evidence.

1 Your Honor, the second paragraph of this is the part that I want
2 to focus on. Your Honor, the defendant was asked, and he spoke
3 to DoD about what he knew about the murders and beheadings of
4 James Foley and Steven Sotloff. And he gave this very detailed
5 information about what he claims Mohammed Emwazi, the person who
6 beheaded them, said to him about those murders. And, in fact,
7 the information was so specific that he provided a map track on
8 this particular document of the location in the desert where he
9 and Emwazi used to go shooting, where he claims that these
10 beheadings likely took place. Or at least that's what Emwazi
11 had said.

12 But, Your Honor, the defendant never said this to
13 anyone. Special Agent O'Toole testified --

14 THE COURT: You mean anyone other than the DoD?

15 MR. GIBBS: I'm sorry. In 2019, during those media
16 interviews, after the defendant claimed he was told to repeat
17 what he had said to DoD, he never said that in any of them.

18 In fact, Your Honor, I would like to play one short
19 clip of the Sean Langan interview to demonstrate that. And,
20 Your Honor, just to sort of set up this clip, Sean Langan had
21 asked the defendant about what Emwazi told him about the
22 James Foley execution. The defendant responded that he didn't
23 tell him anything. And Langan really presses him about, well,
24 you know, he trusted you enough to see him execute someone.

25 And what Langan was talking about there was this

1 incident where a Syrian hostage was executed; Elsheikh was
2 there, Emwazi was there, Kotey was there. The hostage was
3 executed with a gun. Five of the western hostages were there
4 holding signs up. And as you'll hear in this clip, Elsheikh
5 wants to differentiate between the James Foley execution video,
6 which was a published ISIS video -- and ISIS had a very
7 sophisticated media operation. He wanted to differentiate
8 between that and this murder of the Syrian hostage.

9 So that's sort of the wind-up to this clip.

10 (Video played in open court.)

11 THE COURT: What was your purpose, again, in showing
12 this clip?

13 MR. GIBBS: So this clip, Your Honor -- or in this
14 clip, the defendant is asked specific questions about what
15 Mohammed Emwazi told him about the murder of James Foley. And
16 his answer, in sum and substance is: He didn't tell me
17 anything. I confronted him about it, and he gave me a look
18 which I interpreted to mean that he had murdered James Foley.

19 So he didn't repeat what he told DoD about the details
20 of James Foley's murder, how he was murdered, where he was
21 murdered, what happened to the body. And again, if the defense
22 argument is, his will was overborne and he was forced to repeat
23 what he said to DoD, he didn't do that. Which is the hallmark
24 of voluntariness. He made a considered judgment and determined
25 he wasn't going to do that. So he didn't repeat to Sean Langan

1 what he told DoD about the murder of James Foley.

2 THE COURT: All right. Anything further?

3 MR. GIBBS: Just briefly, Your Honor, there's one other
4 exhibit I want to publish quickly. It's the second page of 5-2.
5 If we could enlarge the paragraph at the top about the death of
6 Goto and Yukawa.

7 THE COURT: All right. Mr. Gibbs, where does this come
8 from?

9 MR. GIBBS: Your Honor, this is a summary of another
10 DoD interview of the defendant. He made -- he provided this
11 information related to two Japanese hostages who were actually
12 killed very late in the hostage-taking scheme. They weren't
13 killed until January of 2015. They were also beheaded. There
14 was also a Norwegian hostage who was held by ISIS.

15 So this is very specific detailed information that
16 Mr. Elsheikh provided to the DoD about the two murdered Japanese
17 and about the Norwegian hostage. Mr. Elsheikh was asked very
18 specific questions by a number of media interviewers, including
19 Sean Langan repeatedly, about his role in the negotiations for
20 the hostages, and as Special Agent O'Toole testified at the
21 hearing, the defendant never repeated this information in any of
22 the media interviews. In fact, he never repeated any
23 information anywhere close to this, and certainly not with this
24 level of detail.

25 So, Your Honor, this really gets to the heart of the

1 defense argument. If the defense argument is the abuse was so
2 overwhelming that his will was overborne such that his
3 statements became involuntary, we're stuck with the fact that
4 the defendant makes a very specific allegation. He says it
5 wasn't just abuse for the sake of abuse, it was abuse for a very
6 specific purpose: Repeat what you said to DoD to the media in
7 2019. So either the abuse really didn't happen, or, if there
8 was mistreatment of some sort, the defendant chose not to do
9 what he was told to do by the SDF, and he didn't repeat that DoD
10 information.

11 And finally, I think showing how little SDF really
12 cared about this, as you heard from the government's
13 presentation, Sean Langan wanted to interview the defendant at
14 least twice, and it was only after the blowup with
15 Alexanda Kotey, when they got angry with each other on camera,
16 that he was prohibited from doing that. So SDF doesn't let him
17 interview the defendant because Sean Langan and Alexanda Kotey
18 had a screaming match? After they had abused and physically
19 mistreated El Shafee Elsheikh for weeks and overbore his will
20 and forced him to give these interviews? It simply makes no
21 sense, Your Honor.

22 And we would submit, there's no basis on which to
23 suppress the 2019 media interviews, and certainly we don't think
24 the 2018 were even part of the defendant's motion.

25 Thank you, Your Honor.

1 THE COURT: Ms. Ginsberg?

2 MS. GINSBERG: Thank you, Your Honor. Mr. Gibbs is
3 correct, we are not seeking to suppress the 2018 media
4 interviews. During those interviews, Mr. Elsheikh made it very
5 clear in his affidavit, declaration, that he was not tortured in
6 a manner that he describes in the declaration. He did describe
7 a number of beatings over a period of time by SDF guards, but he
8 is not alleging that the 2018 interviews were the product of
9 abuse or torture.

10 Your Honor, the government has pointed out some very
11 specific inconsistencies between the declaration and statements
12 that were made to the media. But I think what might be helpful
13 to the Court is to hear some additional comparisons of evidence
14 that support the allegations that were made in Mr. Elsheikh's
15 declaration.

16 First and maybe most important, or most corroborative,
17 was the debriefing of Mr. Alexandra Kotey that was provided to
18 the defense and was made an exhibit at the hearing. And for the
19 Court's purposes, that is Defendant's Exhibit 121. That
20 debriefing describes the events that occurred when Mr. Elsheikh
21 and Mr. Kotey were captured. Mr. Kotey's description of the
22 capture, of the beatings that they and other prisoners endured,
23 is almost identical to the description that Mr. Elsheikh gives
24 in his declaration of those events.

25 Mr. Kotey's further descriptions of beatings that

1 occurred at different times while they were in SDF custody are,
2 in significant respects, parallel if not identical to some of
3 the descriptions that Mr. Elsheikh included in his declaration.

4 There are two areas that are very specific that are
5 part of Mr. Kotey's debriefing, that virtually mirror
6 Mr. Elsheikh's description of the torture that are rel --
7 perhaps more relevant to this motion. One is the torture -- or
8 the beatings that occurred following the time of the riot at the
9 Derik prison, and the torture that both of them endured prior to
10 the 2019 CNN interviews. And I'll address those things more
11 specifically when I get to those topics.

12 But at least some Department of Defense officials who
13 identified -- who interviewed Mr. Kotey when he was delivered
14 into DoD custody confirmed -- or made findings that Mr. Kotey's
15 reports of torture were credible. He made reports to the DoD
16 approximately five months before he was released from DoD -- SDF
17 custody into DoD custody, that he was abused in a number of
18 ways.

19 There is an exhibit, Defendant's Exhibit 121, which
20 details the specific acts of abuse that Mr. Kotey claims he was
21 subjected to. That report has findings in it that, based on not
22 only the interview with Mr. Kotey, but physical examination of
23 Mr. Kotey, that those reports were credible.

24 So while at the hearing, the government took the
25 position that they weren't vouching for the credibility of

1 Mr. Kotey's debriefing, at least certain DoD officials to whom
2 Mr. Kotey reported acts of abuse found those credible. And I
3 think Your Honor can read the debriefing on October 8th of this
4 year of Mr. Kotey where he describes the abuse, and can see that
5 at least with respect to critical aspects of Mr. Elsheikh's
6 declaration, that Mr. Kotey has confirmed the same abuse.

7 Mr. Gibbs made -- argues that this court should treat
8 the testimony of the SDF officials as credible; that their
9 allegations that there were no -- that no abuse occurred in the
10 prison, with the exception of the one incident that was reported
11 before the time that SDF Witness 2 actually was working at
12 that -- at the Derik prison. Your Honor, it's our position that
13 that testimony was ludicrous. And I would just like to go
14 through some of those witnesses and point out some of the
15 inconsistencies.

16 But I think there is sufficient -- Your Honor heard the
17 testimony. There's sufficient reason to believe that much of
18 that testimony is not, in fact, credible; that these denials --
19 frankly, the way they described the conditions at the prison
20 sound like it would be not a bad place to go and spend a week.
21 And I just don't think that that's a credible description of
22 what was going on.

23 But SDF Witness Number 1, who has oversight of all of
24 the prisons and is responsible for coordinating the coalition
25 partners, meetings with the detainees, claimed he spent half his

1 time between Ayn Issa and Derik prisons, both of which
2 Mr. Elsheikh was held at. What it turned out, his knowledge of
3 the conditions at Ayn Issa prison in the years 2018 and 2019,
4 which is the time Mr. Elsheikh was detained in those prisons,
5 consisted of one visit to that prison over a two-year period.
6 And based on one visit to Ayn Issa prison, he told this court
7 that he could vouch for the conditions of the prisoners and the
8 conditions at that prison.

9 The same with Kobani. He testified that he visited the
10 Kobani prison once in that two-year timeframe, in August of
11 2019, and that the conditions in all of the prisons that he was
12 responsible for were the same; that he saw no fear or worry on
13 the detainees' faces. He testified, with respect to the Kobani
14 prison, that he didn't have time to even talk with the
15 prisoners, but claims that he heard no complaints from any of
16 the guards.

17 He claimed that the prisoners all had sleeping mats,
18 blankets, pillows, and comfortable living conditions. There was
19 an email that was attached to the original motion to suppress
20 that we filed. It was classified at the time, but it...

21 THE COURT: Seems like a good time for me to mention
22 that I literally have hundreds of pages of briefs on these
23 issues. That's why I was sort of surprised you-all wanted oral
24 argument in addition to this mountain of paper I have already
25 received.

1 But I did allow oral argument, and I have no regrets
2 about that. Go ahead and finish your argument, Ms. Ginsberg.

3 MS. GINSBERG: Thank you, Your Honor. And the point, I
4 think, of this argument is to try and tie the testimony that was
5 heard over those three days to the arguments that were made in
6 the briefs. Which Your Honor is right, you have a mountain of
7 written briefs.

8 But getting back to this witness -- in fact, all of the
9 witnesses who testified that the conditions at these prisons
10 were comfortable, and that there were no issues with respect to
11 the quality of the care that the prisoners were receiving, the
12 Department of Defense interrogators, in an email in January of
13 2018, speaking of the Ayn Issa prison - which was the same
14 prison that SDF Witness Number 1 described as having comfortable
15 conditions - wrote that there were no less than 50 prisoners
16 sleeping on top of each other at Ayn Issa prison. Quite
17 different from the description that they all had their own beds
18 and they had mattresses and plenty of space on the floor.

19 That same witness testified that -- and this is a minor
20 point, but that he never heard that the prisons were infested
21 with bugs in that time period. SDF Witness Number 2 said they
22 had an infestation of lice, and that it was widespread.

23 The witness --

24 THE COURT: None of that would be sufficient to be
25 overborne -- someone's will to be overborne.

1 MS. GINSBERG: No, of course not. But the point I'm
2 making right now is that the Court should look very seriously at
3 the credibility of the witnesses who testified that there was no
4 torture or no abuse in these prisons.

5 THE COURT: They didn't know of any, is what they were
6 saying. If it occurred -- it may have occurred. I think you're
7 correct to point out that they might not know. That's different
8 from saying they're lying.

9 MS. GINSBERG: Well, I totally agree with what
10 Your Honor is saying. But they also testified that had there
11 been abuse there, they would have known.

12 THE COURT: Yes, they did testify, because of their
13 reporting mechanism. But we don't know whether that was
14 failsafe or not.

15 MS. GINSBERG: Exactly.

16 THE COURT: And that's your point. But again, it
17 doesn't get me to whether your client's will was overborne.

18 MS. GINSBERG: Your Honor, the point of all of the
19 inconsistencies in the SDF testimony is that he has alleged
20 specific acts of abuse at these prisons, and specifically at
21 Derik prison. And there --

22 THE COURT: Tell me, even if I accepted all of that, do
23 you think his will was overborne?

24 MS. GINSBERG: I do. I wouldn't be standing here --

25 THE COURT: I know you would say that. But I'm

1 suggesting to you that I might not agree with that. And all
2 this other Who Shot John isn't one way or the other. Certainly
3 the person who runs the prison is going to say, "I was doing a
4 good job, I tried to do this, I tried to do that." Now, you
5 argue that there were instances of abuse.

6 MS. GINSBERG: Your Honor, if I may, Mr. Elsheikh
7 described the abuse he suffered prior to the CNN interview --

8 THE COURT: I've read that, and I don't need to be
9 instructed by you again on that. Whether I find that credible
10 or not is something I have to determine.

11 MS. GINSBERG: Well, I was going to read to you from
12 Mr. Kotey's debriefing of the same exact time period, and what
13 he said with respect to these media interviews.

14 THE COURT: He has since pled guilty.

15 MS. GINSBERG: That's right. He has pled guilty and
16 has been --

17 THE COURT: And he's not asserting that anymore.

18 MS. GINSBERG: Judge, he never -- let me -- Mr. Kotey
19 never asserted that the abuse that he suffered made his
20 statements involuntary. He never did.

21 THE COURT: That's right.

22 MS. GINSBERG: He said: I was abused, but I still made
23 the voluntary choice to participate in these interviews.

24 The point that I'm trying to make is that Mr. Kotey
25 confirms the specific allegations of abuse --

1 THE COURT: No, he didn't say: I was present when that
2 happened to Elsheikh.

3 MS. GINSBERG: No, but he describes it as -- well, some
4 of it he did.

5 THE COURT: Yeah, but he didn't say: I saw it happen
6 to Elsheikh.

7 MS. GINSBERG: No. But Your Honor --

8 THE COURT: Look, I have read all of that. Tell me
9 what you think I should be -- the arguments you're making from
10 Kotey, just tell me that argument.

11 MS. GINSBERG: Mr. Kotey said the prior two --

12 THE COURT: Just tell me what the argument is. He said
13 he was tortured. Now, you tell me why I should assume that that
14 makes it true for Elsheikh.

15 MS. GINSBERG: Because Your Honor has to determine the
16 credibility of Mr. Elsheikh's testimony. The SDF agents --

17 THE COURT: He didn't give testimony --

18 MS. GINSBERG: Well, his declaration.

19 THE COURT: -- he gave a declaration that is not
20 subject to cross-examination. So immediately it's more suspect
21 than if he had appeared and testified.

22 MS. GINSBERG: That's correct.

23 THE COURT: Thank you.

24 MS. GINSBERG: But Your Honor will consider everything
25 else that was testified to at the hearing to inform the Court's

1 decision regarding the credibility of that declaration. Some of
2 that evidence is evidence from the SDF agents. We spent more
3 than an entire day hearing that there was no abuse that
4 they were aware of --

5 THE COURT: Well, they didn't testify to examples of
6 abuse, but, as I recall, one guard was fired, removed.

7 MS. GINSBERG: Yes. And the testimony with respect to
8 that was that he was -- a report was made that he knocked
9 somebody's hat off of a prisoner's head. They believed that
10 part of it. The allegation was made by that particular prisoner
11 that he was also choked. Based on the denial of the guard, the
12 choking -- they determined the choking didn't occur. But they
13 fired him. They removed him from the prison.

14 Your Honor, the fact that they would make a
15 determination to fire somebody for knocking somebody's hat off,
16 and accepting an explanation that -- a denial from a guard that
17 he didn't choke them, is an indication of the kind of cover-up
18 of the abuse that I think the Court could infer --

19 THE COURT: I see that argument, and I don't think it's
20 off the mark. That is to say, I see the basis for that
21 argument. Does your client have any motive to falsify? That's
22 a rhetorical question. The answer is yes. I have to make a
23 decision whether he's lying or whether he's not.

24 MS. GINSBERG: That's right.

25 THE COURT: All right.

1 MS. GINSBERG: And my reason for referring and relying
2 on Mr. Kotey's description of the abuse that occurred around
3 the -- prior to the CNN interview, and the expectations of the
4 SDF with respect to the media interviews, is that that is
5 corroboration -- it is corroboration of the allegations that
6 Mr. Elsheikh -- the allegations of abuse that Mr. Elsheikh says
7 that he himself suffered.

8 THE COURT: All right. I understand that. What else
9 do you have?

10 MS. GINSBERG: As it happened, Mister --

11 THE COURT: Just a moment.

12 (OFF THE RECORD.)

13 THE COURT: Ms. Ginsberg, I'm not limiting you in any
14 way, but can you give me an estimate of how much more you have?

15 MS. GINSBERG: Maybe 15 minutes, Your Honor.

16 THE COURT: And, Mr. Gibbs, how much by way of
17 response?

18 MR. GIBBS: Your Honor, at the end of Ms. Ginsberg's
19 presentation, if there are particular points the Court wants me
20 to respond to, I'm happy to --

21 THE COURT: No, I want your judgment.

22 MR. GIBBS: Maybe none, but less than five minutes, for
23 sure.

24 THE COURT: I'm going to recess now for 15 minutes, and
25 then, when I return, Ms. Ginsberg, I'll expect you to finish

1 your argument in the time you've indicated you need. And then,
2 Mr. Gibbs, you may then respond, and then we're done for the
3 day.

4 Court stands in recess.

5 (Recess taken at 3:27 p.m.)

6 THE COURT: Ms. Ginsberg, you may complete your
7 argument.

8 MS. GINSBERG: Thank you, Your Honor. With respect to
9 the media interviews, I want to read from Mr. Kotey's
10 debriefing. He says that: Following an ANA interview that
11 Mr. Elsheikh refused to participate in, Elsheikh was removed
12 from his cell, handcuffed behind his back, beaten, and placed in
13 another cell. The next time he saw Elsheikh was at the CNN
14 interview with Nick Patton Walsh, which took place at the end of
15 Ramadan. Leading up to this interview, Kotey had been subject
16 to what he described as food deprivation, and had been left in
17 handcuffs for approximately one month. Elsheikh informed Kotey
18 that this time he believed he had an injury to his ear, which
19 resulted from being struck. Following the interview, beatings
20 and rough treatment at the prison continued.

21 During the media interviews, SDF interrogators were
22 always present in the room, but not always the same
23 interrogators. The interrogator in the room during Langan's
24 interview of Kotey had previously interrogated Kotey.

25 Regarding SDF expectations of Kotey and Elsheikh with

1 respect to the media interviews, they were expected to
2 participate in all media interviews or be subject to further
3 food deprivation and violence. They were also expected to admit
4 to nothing less than they had already -- had previous -- than
5 they had already in previous interviews and interrogations.

6 THE COURT: And, of course, they didn't.

7 MS. GINSBERG: They didn't what?

8 THE COURT: They didn't admit to everything they
9 had previously --

10 MS. GINSBERG: Judge, I'm going to get to that. They
11 didn't admit to everything, but Mr. Elsheikh, in his media
12 interviews, with very limited exceptions, made admissions that
13 were very similar to admissions that he made over the course of
14 these 26 DoD interviews, which occurred over a year before the
15 media interviews in 2019. And the notion that he should be
16 expected to remember exactly what he said during these
17 interviews I think is not --

18 THE COURT: Not what he said, what he did.

19 MS. GINSBERG: Judge, he was not asked the precise same
20 questions --

21 THE COURT: I understand. I'll look at it carefully,
22 but I think you would have to concede that he didn't tell them
23 everything.

24 MS. GINSBERG: No, he didn't tell them everything --

25 THE COURT: That's right.

1 MS. GINSBERG: -- but he could not have. Because these
2 interviews took tens, if not hundreds, of hours.

3 THE COURT: So your answer is, he did his best to do
4 it.

5 MS. GINSBERG: He did the best he could. And,
6 Your Honor, I have --

7 THE COURT: And I'll make a judgment as to whether
8 that's true or not. Let's proceed.

9 MS. GINSBERG: Your Honor, in the Langan interview,
10 Mr. Langan testified that Mr. Elsheikh was escorted by two
11 guards and two -- two interrogators who -- or two other SDF
12 individuals who sat in the room during the interview and filmed
13 the interview. Mr. Langan expressed concern that something bad
14 could happen to Mr. Elsheikh if Mr. Elsheikh criticized the SDF
15 on camera. He said that at page 221 and 222 of his testimony.
16 He acknowledged that his photographer --

17 THE COURT: Who is "he"?

18 MS. GINSBERG: Langan. Mr. Langan.

19 THE COURT: So you want me to credit Langan, who is --
20 in this situation? This is the same Langan who got into a near
21 fistfight with Kotey later on?

22 MS. GINSBERG: Your Honor, I want you to take into
23 account to the same extent that you're taking into account
24 evidence that the government is asking you to rely on, that we
25 would suggest is equally suspect, if this is suspect at all.

1 THE COURT: All right.

2 MS. GINSBERG: But I think the Court ought to weigh all
3 of the evidence, and I'm just pointing out --

4 THE COURT: I promise you I will. It won't be
5 necessarily to the government's liking or to yours.

6 MS. GINSBERG: I understand that, Your Honor.

7 THE COURT: Good.

8 MS. GINSBERG: But Mr. Langan also testified that his
9 photographer and he knew, based on conversations that they had
10 with him, that Mr. Elsheikh had a fear of being sent to Iraq.
11 And Mr. Langan raised the prospect of him being sent to Iraq
12 several times during the interview.

13 Mr. Langan testified that the photographer and he both
14 agreed that Mr. Elsheikh looked like a broken man, and he quoted
15 the photographer, saying, "It looked to us like the game was
16 up." He also was quoting the photographer as saying the fact
17 that the French prisoners were being sent --

18 THE COURT: Now we're talking about what some
19 unidentified photographer said?

20 MS. GINSBERG: Who was present at the interview.

21 THE COURT: But he wasn't under oath and hasn't
22 submitted anything.

23 MS. GINSBERG: No. But this is Mr. Langan's
24 description of what was occurring during this interview.

25 THE COURT: All right. Go on.

1 MS. GINSBERG: And he said that the --

2 THE COURT: Who is "he" now?

3 MS. GINSBERG: Mr. Langan testified that the
4 photographer stated that: The news of the French prisoners
5 being sent to Iraq has knocked the stuffing out of him, meaning
6 Mr. Elsheikh, and that he looked like a broken man compared to
7 the earlier interview -- media interviews in 2018, when he was
8 seen joking with -- at least on some occasions, joking with some
9 of the interviewers.

10 THE COURT: And, of course, some of the abuse he claims
11 he suffered was in 2018.

12 MS. GINSBERG: But he testified -- he claims in the
13 declaration that he did experience certain beatings, but not to
14 the extent of the beatings that he suffered and the abuse that
15 he suffered in the months preceding the CNN interview, which was
16 the first of the interviews where he -- it's the first time he
17 made any reference to the hostages.

18 (Brief pause.)

19 THE COURT: Go ahead, Ms. Ginsberg.

20 MS. GINSBERG: I think Your Honor saw and can look at
21 the -- if we can put up the clip from the CNN -- from the Langan
22 interview. Your Honor, this is a clip that we've included on a
23 disc that we've given Ms. Randall, which it's very difficult to
24 hear. But we've made a disc of all of the media clips and clips
25 from the recordings that were made of Mr. Elsheikh and Mr. Kotey

1 while they were in DoD custody, which the government has relied
2 on and we have relied on in our briefs, and we've put them all
3 on one disc for the Court's convenience.

4 THE COURT: Completely or excerpted?

5 MS. GINSBERG: These are all excerpts that we have
6 relied on, we relied on in our pleadings.

7 THE COURT: So when I look at this, it should be your
8 excerpts, not what the government wants me to see?

9 MS. GINSBERG: That's correct. And the government has
10 submitted its own excerpts.

11 THE COURT: All right. Go on.

12 MS. GINSBERG: This is an excerpt from Mr. Elsheikh's
13 interview with Mr. Langan, where he is being asked by Mr. Langan
14 why he is withholding information, why he is hesitating to
15 answer questions and withholding information.

16 And I think Your Honor can see, with respect to the
17 marks on Mr. Elsheikh's face, the mark that he had at the top of
18 his head from praying, the prostration mark, is in a very
19 different place and is very different than the several bruising
20 marks that can be seen on the lower and side portion of his
21 forehead.

22 THE COURT: I'll look, but I'm not sure I see what you
23 see. Go ahead.

24 (Video played in open court.)

25 MS. GINSBERG: Your Honor, I apologize, the audio is

1 not very good.

2 (Video played in open court.)

3 MS. GINSBERG: Lastly, with respect to Mr. Langan's
4 observations of Mr. Elsheikh during the interview, he described
5 Mr. Elsheikh as diminished and emaciated as compared to his 2018
6 interviews.

7 THE COURT: Didn't look emaciated to me there. Did you
8 look at his Body Mass Index when he got to DoD?

9 MS. GINSBERG: Your Honor, he weighed --

10 THE COURT: Answer my question.

11 MS. GINSBERG: I saw his Body Mass Index -- I don't
12 recall the Body Mass Index, but his weight when he arrived at
13 DoD was significantly higher than what it was at this time.

14 THE COURT: All right. Go on. You know that because
15 he was weighed at this time?

16 MS. GINSBERG: He was weighed.

17 THE COURT: At this time? When you claim he was
18 emaciated, he was weighed? The answer is no, he wasn't.

19 MS. GINSBERG: He wasn't weighed at this time. But I
20 have seen the earlier interviews, and his physique is noticeably
21 different.

22 THE COURT: All right. Go on.

23 MS. GINSBERG: So the motivation that Mr. Elsheikh
24 claimed in his declaration, initially in the DoD interviews and
25 throughout, was that he, first and foremost, from a

1 psychological point of view, was afraid of being sent to Iraq
2 and being subjected to summary trials and possible execution.
3 And there was evidence that that -- of that threat throughout
4 the whole time that he was detained.

5 He was told by Agent Kath that one of the options was
6 to send him to -- one of the options about what would happen to
7 him was to send him to Iraq. One of the other -- JR, one of the
8 other DoD interviewers, testified that it would be coercive, in
9 his opinion, if they threatened to send Mr. Elsheikh to Iraq.
10 So that is, even in the minds of the DoD interrogators, a
11 realistic threat that would serve as a coercive factor in --
12 effect on an individual in his circumstances.

13 Mr. Langan cautioned him about the likelihood of -- in
14 that interview, about the likelihood of being prosecuted in the
15 UK or the United States being increased if he made admissions
16 regarding his involvement with the hostages. And even as late
17 as just prior to Mr. Elsheikh being brought from DoD custody in
18 Iraq to the United States for prosecution, Attorney General Barr
19 wrote a letter, which I've provided to the government and will
20 provide to the Court, in which the -- he made it clear that
21 Mr. Kotey and Mr. Elsheikh were being held by the United States
22 military authorities overseas, in their theatre of military
23 operations; that it was not tenable to continue holding them
24 there for an extended period; that final decisions had to be
25 made; and, accordingly, given these circumstances, it should be

1 clearly understood that the United States will move forward with
2 plans to transfer Kotey and Elsheikh to Iraq for prosecution in
3 the Iraqi justice system unless, by October 15th, 2020, all
4 litigation in the United Kingdom seeking to prevent the use of
5 United Kingdom evidence in the United States has been fully and
6 finally resolved.

7 So there is evidence, clearly, throughout the course of
8 Mr. Elsheikh's detention that the specter of being sent to Iraq
9 if he didn't comply with what was being expected of him was a
10 real and present fear, and that it was a fear that is considered
11 and should be -- considered by the DoD, and should be considered
12 by this court as a form of coercion.

13 And the fact that Mr. Langan mentioned it several times
14 during his interview, and then elicited statements from
15 Mr. Elsheikh concerning the hostages, is -- brings that fear and
16 that element of coercion right into the media interview. Even
17 though it was not a threat being made by the government, but --
18 who was the one that could send him to Iraq, but Mr. Langan made
19 a very intentional -- what appears to be a very intentional
20 effort to remind Mr. Elsheikh that if he didn't become
21 forthcoming and didn't begin to make statements involving his
22 involvement with hostages, making it more possible to prosecute
23 him in this country, that he could be sent, and would likely be
24 sent, to Iraq.

25 Finally, Your Honor - almost finally - with respect to

1 Mr. Elsheikh's reports of abuse to the medical team or the
2 doctors or psychologists at the Department of Defense prison in
3 Iraq, though he did not mention -- did not complain of abuse
4 during the medical examination that Mr. Gibbs discussed and
5 showed the Court, previously, there is a -- he was interviewed
6 by a member of the Combat Operational Stress Control Group,
7 which is part of the DoD operation in Iraq, and during that
8 interview he did disclose abuse. And the person with whom this
9 interview was had described Mr. Elsheikh's mental condition as
10 displaying some mental trauma.

11 Your Honor, I believe this exhibit was part -- was
12 attached to one of our prior pleadings, but the Court can see
13 what report he --

14 THE COURT: What is it that you're displaying now?

15 MS. GINSBERG: This is the report that was made by the
16 Combat Operational Stress Control Group personnel who
17 interviewed Mr. Elsheikh, and he said that: "Mr. Elsheikh
18 acknowledged physical abuse while in SDF custody. Due to this
19 abuse, he displayed some degree of mental trauma, though" --
20 "however, Elsheikh did not exhibit characteristics consistent
21 with PTSD."

22 THE COURT: In other words, he made a complaint, they
23 recorded the complaint, and they said it didn't amount to PTSD?

24 MS. GINSBERG: That's correct.

25 THE COURT: All right.

1 MS. GINSBERG: Your Honor, with respect to the
2 differences - or the purported differences - between his media
3 statements and the DoD statements, there are certainly more
4 differences, and there were certainly things that he was
5 specifically asked about in the DoD interrogations that he was
6 not asked about during the media interviews. But, generally
7 speaking, these DoD interviews lasted a -- spanned a period of
8 30 days; there were 26 separate interviews, and they occurred
9 over a year before the media interviews.

10 The notion that he should -- Mr. Elsheikh should
11 remember exactly what he said and what he was asked during those
12 interviews I don't think is -- is a substantial reason to
13 believe that he was intentionally withholding statements during
14 his media interviews, and not intending to comply with the
15 instructions that he had received to repeat what he had
16 previously admitted.

17 Um...

18 (Brief pause.)

19 THE COURT: Anything else? Because that's been --
20 that's not the first time I've heard this. Anything else,
21 Ms. Ginsberg?

22 MS. GINSBERG: If I could have a minute, Your Honor.

23 THE COURT: Yes, you may.

24 MS. GINSBERG: Your Honor, I think we do have a
25 document which is a declassified version of the TIRs, which are

1 the descriptions -- the reports of the DoD interviews. I don't
2 want to put them in the record, but if the Court would find it
3 useful to compare -- for comparison purposes --

4 THE COURT: We already have that in the record.

5 MS. GINSBERG: I think what you have is a classified
6 version of it.

7 THE COURT: That's right. We're down there in the SCIF
8 doing that.

9 MS. GINSBERG: I was trying to save the Court a little
10 bit of effort. This is considerably shorter.

11 THE COURT: We're doing it thoroughly.

12 MS. GINSBERG: Thank you, Your Honor.

13 But I would say, in substance, I think when the Court
14 reviews these TIRs and the content of the media interviews, the
15 Court will see that with very few exceptions, Mr. Elsheikh made
16 similar admissions regarding his involvement with the hostages.

17 THE COURT: All right. Thank you. You've said that
18 before. Anything else?

19 MS. GINSBERG: Yes. I think the Court can also infer
20 that Mr. Elsheikh's admissions during -- that he -- the
21 admissions during the media interviews were, in his mind,
22 sufficiently similar to stave off future beatings and future
23 periods of starvation, and that he had a motive to comply with
24 these -- with the demands of the SDF to repeat these statements,
25 but also not further incriminate himself in public media

1 statements that would be publicly broadcast and certainly
2 admissible against him in court.

3 THE COURT: All right. Thank you.

4 MS. GINSBERG: Thank you, Your Honor.

5 THE COURT: Mr. Gibbs?

6 MR. GIBBS: Thank you, Your Honor. Judge, very
7 briefly, on the point Ms. Ginsberg made about the threats of an
8 Iraqi prosecution, in the defendant's declaration at page 3, at
9 the bottom, he makes a passing reference to being aware of that,
10 and yet nowhere else in the declaration does he claim that that
11 was some sort of motivation. And, in fact, at the end of the
12 declaration he claims that the statements he gave to the media
13 in 2019 were due to one fact and one fact only: The physical
14 abuse that he claims that he endured that overbore his will.

15 So the Iraqi conversation had nothing -- you know,
16 based on his declaration, that had no bearing on what he claims
17 he was forced to do.

18 The only other point I want to make, Judge, is, I'm
19 glad the defense played that last clip for Your Honor, because I
20 think it's, once again, instructive. That was a clip with
21 Sean Langan, where Sean Langan is pressing him very hard about:
22 Why are you not being more forthcoming?

23 And he tells him: You know, given my current
24 disposition, I'm not willing to be more forthcoming. And not
25 being forthcoming means not repeating what he told DoD.

1 So, again, it's a perfect example of being pressed and
2 pressed by the interviewer, and he refuses to repeat that
3 information, because his will was not overborne and he was
4 speaking voluntarily.

5 Thank you, Judge.

6 THE COURT: All right. I'll take the matter under
7 advisement and deal with it as promptly as I can.

8 Call the next matter, please.

9 (Off the record at 4:20 p.m.)

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15 **CERTIFICATE OF OFFICIAL COURT REPORTER**

16
17 I, Rebecca Stonestreet, certify that the foregoing is a
18 correct transcript from the record of proceedings in the
19 above-entitled matter.

20
21
22
23 ___//Rebecca Stonestreet//___

 ___10/27/22___

24 **SIGNATURE OF COURT REPORTER**

DATE